THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS APPLICATION NO. 548 OF 2013

(Arising out of High Court Civil Suit No 446 of 2013)

NAKIRANDA ROBINAH:: APPLICANT

VERSUS

1. **SIRIVE MUSOKE MBIDDE**
2. **LUBOWA TADEWO**
3. **MULEME GEOFFREY**
4. **KAVUMA SALONGO**
5. **NAMAGEMBE DORAH :::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. MR. JUSTICEBASHAIJA .K. ANDREW

R U L I N G:

This application is brought under ***Order.9 rr.27 & 28 C PR; Order 52 r.1 & 3 CPR; S.98 CPA*** seeking for orders that:-

(a) The exparte judgment and decree in C.S. No. 446 of 2007 be set aside.

(b) A stay of execution of the decree be granted.

(c) Costs of the application be provided for.

The application is supported by the affidavit of Ms. Robinah Nakiranda, the Applicant, but briefly the grounds are that;

1. ***The Applicant was not served with the summons in Civil Suit No. 446 of 2007 to file a defence.***
2. ***The Applicant was not given the opportunity to be heard and put up a defence.***
3. ***The Applicant did not learn of the existence of the suit until a copy of the judgment was issued to her on the 13th day of June, 2013.***

4. ***It is just and equitable that the judgment and decree be set aside, execution of the court order be stayed and the Civil Suit No. 446 of 2007 be reinstated and determined on its merits as:-***
    - ***(i) The Applicant will suffer heavy irreparable loss and damage as a result of not being given a chance to defend her suit.***
    - ***(ii) The Applicant has a good defence to the suit.***
    - ***(iii) The Application has been made without undue delay.***
    - ***(iv) The Applicant is ready and willing to comply with any conditions to be imposed by this honorable court before setting aside the ex parte judgment and decree and stay of execution.***

Background.

The Applicant is the registered proprietor of ***Block 105 Plot 1736*** land at Seeta, in the Mukono District. The 1st Respondent, the former registered owner of ***Kyaggwe Block 105 Plot 121*** from which ***Plot 1736*** was curved filed ***Civil Suit No. 446 of 2007*** against the Applicant seeking, *inter alia*, for an order of cancellation of certificate of title, an eviction order, a permanent injunction, and costs of the suit. The hearing proceeded *exparte* under ***Order 9 r.20 (1) CPR*** due to the non-appearance of the defendants, and judgment was entered for the Plaintiff, now 1st Respondent. The Applicant filed this application seeking the above stated orders.

Counsel's submissions.

Ms. Judith Tumusiime, Counsel for the Applicant, submitted that under ***O9 r. 27 CPR,*** a defendant may apply to the court by which an *ex parte* decree was passed to set it aside, if he or she satisfies the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing, and the court shall make an order setting aside the decree as against him or her upon such terms as court thinks fit. Counsel relied on ***Barclays Bank Uganda v. Edison Kikwaya Musinguzi, H.C. Civil Suit No. 128 of 2012*** where Obura .J. quoting the

Court of Appeal in ***National Insurance Corporation v. Mugenyi & Company Advocates [1987] HCB 28*** held that;

> ***"The main test for reinstatement of a suit was whether the applicant honestly intended to attend the hearing and did his best to do so. Two other tests were namely the nature of the case and whether there was a prima facie defence to that case …"***

Counsel further submitted that the right to be heard is sacrosanct and guaranteed under ***Article 28 and 44 of the Constitution.*** Counsel cited ***National Enterprises Corporation v. Mukisa Foods Ltd. C.A. Civil Appeal No. 42 of 1997*** to the effect that denying a party the opportunity to be heard should be the last resort of a court, and that where court has not pronounced a judgment upon the merits of the case or by consent of the parties, it is to have power to revoke the expression of its coercive power where that had only been obtained by failure to follow any of the rules of procedure.

Furthermore, that the Applicant was never served with a copy of the summons, and that all evidence of service adduced by the 1st Respondent shows that there is no single time when the 1st Respondent served the Applicant personally, but served lawyers whom the Applicant never engaged and are not known to her at all, and could have been lawyers to the other defendants. Also, that the Applicant was not served even by substituted service through the *Monitor Newspaper* because she is a village woman who does not read newspapers and did not see the summons. That all evidence adduced shows that there were attempts to serve the Applicant, but that the summons were not duly served on her, and that she did not learn of the existence of the case until she was served with a copy of the judgment. Counsel wondered as to why the 1st Respondent could not serve the Applicant with the summons personally, and yet managed to serve her personally with a copy of the judgment.

Counsel maintained that the Applicant has a good defence with a likelihood of success. That she bought the suit land in 2006 from Martin Kintu a son of the 1st Respondent and former registered proprietor of the suit land after conducting a thorough due diligence, and is a *bonafide* purchaser for value. That thereafter she sold this land to one Musinguzi David who lives in Mbarara, and that the suit land is developed with rental units of which she is a caretaker and receives remuneration, and that she could not just have sat down and ignored a pending suit on a property where she derives sustenance.

Regarding the stay of execution of the decree, Counsel cited ***HCT-04 – CV-CA-133-2009, Arising from M.A No. 250 of 2009, Timber & General Store Ltd., Micky Wandera v. Ismail Mugoda,*** where Musota .J. quoting the case of ***Horizon Coaches Ltd v. Pan Africa Insurance Ltd., Civil Appln. 20 of 2002 (SC)*** held that;

> ***"Where a Notice of Appeal, or an application or indeed an appeal is pending before the Supreme Court, it is right and proper that an interim order for stay of execution either in the High Court or in any other court be granted in the interest of justice and to prevent the proceedings and any order therefrom of this court being rendered nugatory."***

Further that in ***G. Afarov. Uganda Breweries Ltd., S.C.Civ. Application No. 11 of 2008*** it was held that the interim order is necessary to preserve the *status quo* until the substantive application for stay of execution is heard and disposed of. Counsel urged this court to exercise its inherent jurisdiction to grants the Applicant a stay of execution of the judgment and decree in the interest of justice, to prevent the proceedings and any order there from being rendered nugatory, and to preserve the *status quo* until the substantive suit is heard on its merits and disposed of.

Mr. Shwekyerera, Counsel for the 1st Respondent, opposed the application arguing that the Applicant has no *locus* to bring this application because in her affidavit she swears that she sold the suit property to another person, one Musinguzi David of Mbarara, and that she is only a caretaker of the buildings thereon. Counsel argued that if this is the case, then it should be the owner of the suit land who should bring this application and not her. Further, that the Applicant more or less seeks injunctive orders and that the prayer seeking that the main suit be reinstated is not part of the prayers in the application and should be disregarded.

Further, that the Applicant's affidavit in support of the application is full of falsehood and that the application is premised on lies. Relying on the affidavit of the 1st Respondent in reply, Counsel gave a chronology of events to show that the Applicant was duly served and was aware of the suit, but ignored the court process. That on 18/09/2007 after the 1st Respondent filed ***Civil Suit No. 678 of 2007*** the Applicant was served with summons and plaint, and that before the 1st Respondent's lawyers could file an affidavit of service, the Applicant engaged *M/s Higenyi, Musambwa & Co. Advocates* who filed a defence on 4/10/ 2007 and served the 1st Respondent's lawyers before the fifteen days of filing a defence.

Furthermore, that the 1st Respondent subsequently filed ***M.A. No. 1167 of 2007 and 1168 of 2007*** all arising from ***CS. No. 678 of 2007*** seeking for an interim order and a temporary injunction, and that the Applicant's lawyers ***M/s. Higenyi, Musambwa & Co. Advocates*** were duly served with the applications as well as hearing notices. That an interim order was granted and served onto the Applicant and so were the subsequent extensions of the same order.

Also, that on 18/11/2008, an order of a temporary injunction was granted and served onto the Applicant, who still disobeyed it and went on with construction on the suit land, and that at the time the Applicant was constructing a commercial building of four rooms and had started plastering it, but now states that she has

sixty seven rental rooms, and wants court's protection. Relying on the case of ***Mugume Ben & A'nor v. Akankwasa Edward H.C.M.A. No. 4 of 2008 [2008] HCB 159,*** Counsel argued that a person who defies court orders cannot at the same time seek its protection for the unlawful activities.

Furthermore, that the 1st Respondent later applied for consolidation of ***Civil Suit No. 446 of 2007*** and ***678 of 2007*** and the order was granted on 4/6/2008, and that again he made an application to amend the pleadings after consolidation of the two suits and served the Applicant physically from the suit land on 03/03/2009, and that her lawyers were also served, and on 10/03/2009, Counsel Mr. Higenyi from *M/s Higenyi, Musambwa & Co. Advocates* attended court as representing the Applicant and others, and conceded to the application upon which an amended plaint was filed on 13/03/2009 and served onto the Applicant's lawyers on 16/03/2009. On 30/03/2009, before the lapse of fifteen days, the Applicant's lawyers filed an amended defence and also a further amended Written Statement of Defence on 22/05/2009. That on 01/04/2009 the Applicant's lawyer and the 1st Respondent's lawyer attended court and were directed to file a joint scheduling memorandum; which they did on 27/04/2009.

Also, that on 22/05/2009, the 1st Respondent's lawyers received a letter from the Applicant's lawyer whom the Applicant had instructed to inquire about the possibility of settling out of court, but that from that point the Applicant, 2nd and 5th Respondents and their lawyer stopped coming to court even though several hearing notices were issued and served onto them; including one through the *Monitor* newspaper. Counsel cited the case of ***Violet .K. Mukasa v. E. Matovu, H.C.C.S. No. 35 of 1988 [1922 – 93] HCB 235*** to support the view that substituted service under the law is as good service as any ordinary service.

That in May 2011the 1st Respondent's lawyers were served with a letter from the Applicant's lawyers indicating that they no longer represented her, and that on

08/12/2012 when the 1st Respondent and his lawyers appeared in court, the Applicant had a new lawyer, Mr. Kabega Musa, and the same lawyer still appeared in court on 21/12/2011.That on 27/02/2012 when the Applicant and her new lawyer absented themselves, the 1st Respondent's lawyer applied to serve them again and they were physically served using a Court Process Server and also through the *New Vision* newspaper. That on the 26/02/ 2013 when the main suit came up for hearing, the Applicant and her lawyer were fully aware having been served with hearing notices by a Court Process Server who filed copy of affidavit of service on the court record.

Counsel argued that the Applicant is reacting now to save herself from impending execution proceedings, and that she is clearly in court with unclean hands after she defied several court orders. Further, that the Applicant has failed to discharge the duty of explaining why *ex parte* judgment was entered against her; but that instead gave contradictory and inconsistent evidence in her affidavits. Counsel prayed for dismissal of the application with costs.

Consideration.

Setting aside an *exparte* decree against a defendant is provided for under ***O.9 r.27 CPR.*** In any case in which a decree is passed *ex parte* against a defendant, he or she may apply to the court by which the decree was passed for an order to set it aside. The defendant must, however, be prepared to satisfy the court that the summons was not duly served, or that he or she was prevented by any sufficient cause from appearing when the suit was called on for hearing. The defendant must also demonstrate that there is merit in the defence to the case.

In the instant case the Applicant states that she was not served with summons, while the 1st Respondent insists that the Applicant was duly served personally and by substituted service. On court record there is an affidavit of service filed by the Court Process Server, one Atyang Faith of the High Court at Kampala, indicating

that the Applicant was served with hearing notices, and that the Applicant acknowledged the service in the subsequent proceedings. In my view, this ought to have been sufficient notice to the Applicant of the proceedings against her already in court.

Apart from the above, the court record also shows that the Applicant was served twice by substituted service through the *Daily Monitor* and *New Vision* newspapers of 29/04/2011and 10/04/2012 respectively. Even if the other modes of service upon the Applicant through her lawyers were not taken into account, substituted service would be sufficient. It is settled law that where service cannot be served in ordinary way, substituted service may be resorted to and it shall be as good as service in the ordinary way. See: ***Erukana Omuchilo v. Ayub Machiwa [1960] E.A. 229.***I respectfully disagree with the view that the Applicant is a village woman and may not have read the newspapers. It cannot be a consideration because substituted mode of service does not discriminate the social status of parties intended to be served.

In the Applicant's Counsel's submissions, she also seems to be seeking for an order of reinstatement of the suit; which does not feature as one of the prayers in the application. I believe this is the reason which prompted Counsel to erroneously cite the cases of ***Barclays Bank (U) Ltd. v. Edson Kikwaya Musinguzi (supra)*** and ***National Insurance Corporation v. Mugenyi & Co Advocates (supra)*** in which the test of reinstatement of dismissed suits was considered. This application, however, seeks to have the *ex parte* decree set aside, and execution stayed. The suit has never been dismissed, and hence the prayer for reinstatement would be redundant in the circumstances.

On the implied claim that *M/s Higenyi, Musambwa & Co. Advocates* were not lawyers for the Applicant, a close scrutiny of the chronology of events on court record seems to dispel any such notion. For instance, when the said lawyers

ceased to represent the Applicant, she retained services of yet another lawyer, Mr. Musa Kabega, who is on record as having represented her. It would be hard and far-fetched to imagine that successive lawyers would instruct themselves. In my view, provisions of ***O.2 r.4 CPR*** would apply and service on the advocate would be presumed to be duly communicated and made known to the party whom the advocate represents. See: ***Bendino v. Kamanda [1977] HCB 311.***

There is further evidence that the Applicant was all along aware of the suit against her but chose to ignore all the court processes served on her. For instance, the hearing notices were served on to her physically at the suit premises on 03/03/2009 when she was still in the preliminary stages of construction of the building and there is proof of service on record of court. Similarly, the Applicant's lawyers on her instructions contacted the 1st Respondent's lawyers on the possibility of settling the matter out of court. Further, the orders of injunction obtained by the 1st Respondent against the Applicant were served onto her to stop the construction, but these too were ignored.

By just denying these glaring facts, the Applicant only comes out as being deliberately untruthful. Court is, nonetheless, satisfied that she was duly served; not only with summons but other court process. She chose to ignore them, and cannot now be heard to seek protection of court whose orders she held in so much contempt. I completely agree that she has not come to court with clean hands. See: ***Mugume Ben & A'nor v. Akankwasa Edward (supra).***

This court is acutely aware that the right to be heard is sacrosanct, and guaranteed under ***the Constitution***. See ***National Enterprises Corporation v. Mukisa Foods Ltd. (supra)***.This right, however, would not accrue to any party who intentionally excludes himself or herself from the jurisdiction of court. Court can only enforce the rights of a party who is properly before it, and who has submitted to its jurisdiction.

Regarding the issue whether the Applicant has the *locus* to file this case, it would appear that as a registered proprietor of the suit land has that power. In her affidavit in support of the application, however, the Applicant gives a contradictory account when she swears that she sold the suit premises to another person, and that she is only a caretaker. As the registered owner the Applicant would be the right person to file this application, because under ***Section 59*** of the ***Registration of Titles Act***, adducing of certificate of title in court is conclusive evidence of ownership. If on the other hand she sold the property and is only a caretaker, she lacks the necessary locus to bring this application. Whichever the case, it would only serve to show that she has no good defence to the main suit with possibility of success. Further, the contradictory and inconsistent depositions which she did not satisfactorily explain would render her evidence unreliable. See: ***Shokatali Abdulla Dhalla v. Sadrudin Meralli S.C.C.A. No. 32 of 1994; Anthony Barugahare v. Marits Ntaratambi [1987] HCB 95.***

The Applicant has failed satisfy court that she had a reasonable excuse for failing to file a defence. The reasons she advanced are inconsistent, contradictory, based on deliberate falsehoods and cannot support the application. She has come to court with unclean hands after being in contempt of several court orders, and this application is just a continuation of the abuse of court process, and this court is enjoined under ***Ss.98 CPA and 17 (2) Judicature Act*** to curtail such abuse**.** Accordingly, the application is dismissed with costs.

BASHAIJA .K. ANDREW
JUDGE
18/09/2013